MEOW LOONG ONN

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, KUALA LUMPUR
DATO' K.C. VOHRAH J
[CRIMINAL APPEAL NO: 41-33-96]
16 JULY 1996

CRIMINAL PROCEDURE: *Trial - Functus officio - Whether Magistrate can continue to hear the same matter after impositon of fine - Continuing offence - Whether legal to recall concluded matter to see if offence is continuing - Charge for continuing offence - Whether the same charge can be relied upon to determine continuing offence - Federal Territory (Planning) Act 1982, ss. 20(l)(a), 26(l)(b).*

LOCAL GOVERNMENT: *Buildings - Development order - Carrying out development work without development order - Deviation from approved plan - Continuing offence - Whether same charge can be used to determine continuing offence - Federal Territory (Planning) Act 1982, ss. 20(l)(a), 26(l)(b).*

The appellant was charged with the offence of carrying out development work on 23 June 1993 on his premises without a development order issued under s. 20(l)(a) of the Federal Territory (Planning) Act 1982 ('the Act') and punishable under s. 26(l)(b) of the Act. He pleaded guilty on 2 November 1995 and was fined RM2,000 in default two months imprisonment. The learned Magistrate then adjourned the case by fixing it for mention on 4 December 1995, 8 January 1996, and 8 February 1996 to enable the prosecuting officer to obtain the investigation report in respect of the continuing offence under s. 26(l)(b) of the Act. On 8 February 1996, the prosecuting officer informed the Court that the investigation report revealed that although a plan had been approved (for the new premises) the works did not conform to the plan. When the appellant had nothing to reply, the Court then proceeded to fine him RM500 per day from 3 November 1995 to 8 February 1996 and thereafter until the premises were demolished. The appellant appealed against the imposition of the fine for the continuing offence.

Held:

[1] The Magistrate was *functus officio* after he had fined the appellant RM2,000 in default two months imprisonment on 2 November 1996 in respect of the offence committed on 23 June 1995 in accordance with the charge. He had fulfilled his judicial function in relation to that charge against the appellant and he no longer had any judicial power to act further in the matter against the appellant. His actions of bringing up the case

for mention against the appellant several times before he fined him for the second time were completely without any legal foundation.

[2] The Magistrate had misdirected himself in construing s. 26(l) of the Act relating to a 'continuing offence' thinking he had power to continue the proceedings and adopt a procedure which is neither provided for in the Act nor in the Criminal Procedure Code.

[3] No charge was preferred against the appellant concerning the so called continuing offence. The continuing offence was one of not carrying out works in accordance with the plan that had been approved. This was obviously different from the offence the appellant was charged with on 3 November 1995, i.e, for carrying out works without a development order.

[4] When an offender continues carrying on development work after having been convicted for the first commission of the offence, or if he does not, after having received an approved plan for his works, comply with the approved plan, then it is for the prosecution to frame the appropriate charge and summon the person to Court where he has to be asked by the Magistrate to plead to the charge.

[Appeal allowed]

Case referred to:
Tan Sin v. PP [1969] 1 MLJ 23 ***(foll)***

Legislation referred to:
Federal Territory (Planing) Act 1982, ss. 20(1)(a), 26(1)(b).

For the appellant - Mah Weng Kwai; M/s. Mah Weng Kwai & Co.
For the respondent - Mohd Ghazali bin Mohd Taib; DPP

JUDGMENT

K.C. Vohrah J:

In this case the appellant was charged in the Magistrates' Court situated at the City Hall Complex for an offence of carrying out development work on 23 June 1993 on his premises without a development order issued under the Federal Territory (Planning) Act 1982 ('the Act'), an offence under s. 20(l)(a) of the Act and punishable under s. 26(l)(b) thereof. The appellant pleaded guilty and he was fined RM2,000 in default 2 months' imprisonment. The Magistrate, however, did not record a finding of guilt or conviction before imposing the fine. There is no appeal against this order but acting in revision I direct a finding of guilt and a conviction be recorded in respect of this offence.

The provision under which he was charged reads as follows:

> 20(l) ... , no person shall commence, undertake, or carry out any development irrespective of whether or not the development is in conformity with the development plan unless -
>
> (a) a development order granting planning permission in respect of the development has been issued to him under the Act;
>
> (b) ...

The punishable section reads as follows:

> 26(l) Any person who whether at his own instance or at the instance of any other person ...
>
> (a) ...
>
> (b) commences, undertakes or carries out development in contravention of subsection (1) of s. 20;
>
> ...
>
> is guilty of an offence and on conviction is liable to a fine not exceeding fifty thousand ringgit and in the case of a continuing offence to a further fine which may extend to five hundred ringgit for every day during which the offence continues after conviction for the first commission of the offence.

As was stated earlier there is no appeal against the fine imposed for the first commission of the offence. The appeal is against the fine of RM500 per day from 3 November 1995 to 8 February 1996 which the Magistrate says in his grounds of decision was a fine imposed for a continuing offence under s. 26(l)(b).

The case against the appellant should have ended on 2 November 1995, the day that he pleaded guilty to the offence that he was charged with, the offence having been committed on 23 June 1993. But the Magistrate instead adjourned the case by fixing it for mention on 4 December 1995 against the appellant. There is a notation in the notes of proceedings against the date 4 December 1995 that the appellant appeared in Court and that the Court fixed 8 January 1996 for mention again. On 8 January 1996 the appellant appeared in Court and the prosecuting officer requested for a new date of mention and stated that the investigation report (laporan siasat) was not ready yet. The Court fixed 8 February 1996 as the next mention date.

On 8 February 1996 the appellant appeared and the Prosecuting Officer then stated that investigations revealed that although a plan had been approved (for the new premises) the works did not conform to the plan. The appellant, according to the record, had nothing to say. The Magistrate then fined the appellant RM500 per day from 3 November 1995 till 8 February 1996 and thereafter until the premises were demolished.

It will be noticed that the Magistrate was *functus officio* after he had fined the appellant RM2,000 in default 2 months' imprisonment on 2 November 1995 in respect of the offence committed on 23 June 1993 as stated in the charge; the Magistrate had fulfilled his judicial function in relation to that charge against the appellant and he no longer had any judicial power to act further in the matter against the appellant. Thus his acts in Court of bringing up the case for mention against the appellant several times before he fined him for the second time are completely without any legal foundation.

The Magistrate must have been misled by the language used in s. 26(l) relating to a "continuing offence" and thought he had power to continue the proceedings and he adopted a procedure which is neither provided in the said Act nor in the Criminal Procedure Code. And it has to be noted that no charge was at all preferred against the appellant in respect of the so called continuing offence. To be noted, too, is that the appellant was charged for a continuing offence which the prosecuting officer stated was one of not carrying out works in accordance with the plan that had been approved (in respect of the premises), this being clearly of a different nature from the offence the appellant was charged with on 3 November 1995 (that of carrying out works without a development order). What the Magistrate did after he became *functus officio* was to take the role of an enforcement officer. He anticipated the commission of an offence and appeared to call for investigation and in fact looked at investigation reports, acting like an enforcement officer exercising executive powers. A Magistrate however, exercises judicial powers and has no power to exercise such executive powers while on the bench.

If a person had continued carrying on development work after conviction for the first commission of the offence or if he did not, after he had received an approved plan for his works, comply with the approved plan (see e.g. *Tan Sin v. PP* [1969] 1 MLJ 230) then it is for the prosecution to frame the appropriate charge and summon the person to Court where he has to be asked by the Magistrate to plead to the charge.

In the circumstances of the case, I allow the appeal and the fine of RM500 per day for the so called continuing offence is set aside. In respect of the charge dealt with on 2 November 1995, as stated earlier, I direct that a finding of guilt and a conviction be recorded.

Reported by Akbardin Abdul Kader